

1  
2  
3  
4 **UNITED STATES DISTRICT COURT**  
5 **DISTRICT OF NEVADA**  
6

7 \_\_\_\_\_ )  
8 KEVIN FERNANDEZ, )  
9 )  
10 Plaintiff, )  
11 vs. )  
12 ISIDRO BACA et al., )  
13 Defendants. )  
14 \_\_\_\_\_ )

3:16-cv-00350-RCJ-WGC

**ORDER**

13 This is a prisoner civil rights complaint under 42 U.S.C. § 1983. Plaintiff Kevin  
14 Fernandez has sued multiple Defendants based on alleged surreptitious poisoning of his food at  
15 Northern Nevada Correctional Center. The Court previously denied Plaintiff's application to  
16 proceed *in forma pauperis* ("IFP") because he had at least three "strikes" under the Prison  
17 Litigation Reform Act and did not allege that he was "under imminent danger of serious physical  
18 injury." 28 U.S.C. § 1915(g). Although Plaintiff alleged surreptitious poisoning of his food, he  
19 had been transferred to New Hampshire, far from the defendants, so there was no threat of  
20 immediate harm. The strikes the Court found were: (1) Case No. 3:13-cv-412, in which Judge  
21 Du dismissed for failure to state a claim; (2) Case No. 3:06-cv-511, in which Judge Sandoval  
22 dismissed the federal causes of action for failure to state a claim and declined jurisdiction over  
23 the state law claims; and (3)–(4) Case No. 1:13-cv-94 in the District of North Dakota, in which  
24 the district court dismissed for failure to state a claim, and the Eighth Circuit summarily affirmed

1 under Eighth Circuit Rule 47A(a), indicating that the Court of Appeals found the appeal to be  
2 “frivolous and entirely without merit.” The Court of Appeals reversed, ruling: (1) the Eighth  
3 Circuit’s affirmance in the North Dakota case did not count as a strike, because although the  
4 panel cited a circuit rule expressly applicable to appeals that are “frivolous and entirely without  
5 merit,” the panel did not separately recite those words in its order; and (2) the dismissal of the  
6 ‘511 Case did not count as a strike under the intervening precedent of *Harris v. Mangum*, 863  
7 F.3d 1133 (9th Cir. 2017) because the case had been removed from state court.

8 In the interim, however, Plaintiff has incurred another strike, bringing the total to at least  
9 three, even discounting the two strikes previously discounted by the Court of Appeals. In Case  
10 No. 1:17-cv-226 in the District of New Hampshire, the district court dismissed the federal causes  
11 of action for failure to state a claim and declined jurisdiction over the state law claims. (*See*  
12 R&R, ECF No. 16 in No. 1:17-cv-226 (D.N.H.); Order Adopting R&R, ECF No. 20 in No. 1:17-  
13 cv-226 (D.N.H.)). The Court therefore again denies IFP status and defers screening.

#### 14 CONCLUSION

15 IT IS HEREBY ORDERED that the Application for Leave to Proceed in Forma Pauperis  
16 (ECF No. 1) is DENIED.

17 IT IS FURTHER ORDERED that Plaintiff shall have thirty (30) days to pay the filing  
18 fees. Failure to comply may result in dismissal without prejudice without further notice.

19 IT IS SO ORDERED.

20 Dated this May 22, 2018.

21  
22   
23 ROBERT C. JONES  
24 United States District Judge